



United States Department of State

*United States Permanent Mission to the
Organization of American States*

Washington, D.C. 20520

March 6, 2019

Dr. Paulo Abrão
Executive Secretary
Inter-American Commission on Human Rights
Organization of American States
Washington, D.C. 20006

**Re: Jurijus Kadamovas *et al.*, Petition No. P-1285-11
Further Observations**

Dear Dr. Abrão:

The United States Government has the honor of submitting to the Inter-American Commission on Human Rights (“Commission”) further observations on the communications forwarded to the United States in the above-referenced matter, including the submission on behalf of Mr. Kadamovas dated November 7, 2017, which were transmitted to the United States via a letter on November 6, 2018. Please find enclosed the United States’ observations. We trust this information is useful to the Commission and thank the Commission for its attention to this matter.

Please accept renewed assurances of my highest consideration.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Ch Trujillo', written over the printed name.

Carlos Trujillo
Permanent Representative

JURIJUS KADAMOVAS ET AL., P-1285-11
FURTHER OBSERVATIONS OF THE UNITED STATES

We appreciate the opportunity to provide further observations on the communications forwarded to the United States in the above-referenced matter, including the submission on behalf of Mr. Kadamovas dated November 7, 2017, which were transmitted to the United States via a letter on November 6, 2018.

The United States recalls its submission of September 1, 2015, in this matter. In that submission, we explained that the Petition is inadmissible and does not demonstrate a failure of the United States to live up to any commitment under the American Declaration. Although the Commission subsequently invoked Article 36(3) of the Rules of Procedure (“the Rules”) to defer a decision on the admissibility of the Petition,¹ the United States reiterates the positions of the September 2015 submission and respectfully requests again that the Commission find the Petition inadmissible.

For the reasons explained below, the Petition remains inadmissible under Article 31 of the Rules because Petitioner has not exhausted his domestic remedies and continues to litigate various claims in the domestic courts of the United States. Moreover, the United States urges the Commission to refrain from operating as a court of fourth instance—or otherwise as an appellate court—in this matter. Finally, the Petition remains inadmissible under Article 34 of the Rules because Petitioner has failed to state facts that establish a violation of his rights under the American Declaration.

I. The Petition is inadmissible because Petitioner has not exhausted domestic remedies

The United States respectfully submits that the matter addressed by the Petition is not admissible and must be dismissed because it fails to meet the Commission’s established criteria in Article 34 of its Rules of Procedure (“Rules”). In particular, Petitioner has either failed to exhaust remedies available to him, or continues to exhaust remedies with respect to certain claims ostensibly presented in the Petition.

The Commission has repeatedly emphasized that a petitioner has the duty to pursue all available domestic remedies. Article 31(1) of the Rules states that “[i]n

¹ Letter from the IACHR to the United States of August 8, 2018.

order to decide on the admissibility of a matter, the Commission shall verify whether the remedies of the domestic legal system have been pursued and exhausted in accordance with the generally recognized principles of international law.” As the Commission is aware, the requirement of exhaustion of domestic remedies stems from customary international law, as a means of respecting State sovereignty. It ensures that the State on whose territory a human rights violation allegedly has occurred has the opportunity to redress the allegation by its own means within the framework of its own domestic legal system.² It is a sovereign right of a State conducting judicial proceedings for its national system to be given the opportunity to determine the merits of a claim and decide the appropriate remedy before resort to an international body.³ The Inter-American Court of Human Rights has remarked that the exhaustion requirement is of particular importance “in the international jurisdiction of human rights, because the latter reinforces or complements the domestic jurisdiction.”⁴ The Commission has repeatedly made clear that the petitioner has the duty to pursue *all* available domestic remedies.⁵ Exhaustion is only realized where such remedy has been pursued to the highest appellate level, resulting in a final judgment.⁶ The arguments raised in the domestic proceedings must be the same as those intended to be raised in international proceedings.⁷ In short, “for an international claim to

² See, e.g., *Interhandel Case (Switzerland v. United States)* [1959] I.C.J. 6, 26–27; *Panevezys-Saldutiskis Railway Case (Estonia v. Lithuania)*, 1939 P.C.I.J., Ser. A/B, No. 76.

³ THOMAS HAESLER, *THE EXHAUSTION OF LOCAL REMEDIES IN THE CASE LAW OF INTERNATIONAL COURTS AND TRIBUNALS* (1968), at 18–19.

⁴ *Velásquez Rodríguez Case*, Judgment of July 29, 1988, ¶ 61, Inter-Am. Ct. H.R. (Ser. C) No. 4 (1988).

⁵ See, e.g., *Páez García v. Venezuela*, Petition No. 670-01, Report No. 13/13, Mar. 20, 2013, Analysis § B(1) & Conclusions ¶ 35 (finding petition inadmissible for failure to exhaust because petitioner did not avail himself of remedies available to him in the domestic system).

⁶ See also Draft Articles on State Responsibility, [2001] 2 Y.B. Int’l L. Comm’n 26, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2), art. 44; Draft Articles on Diplomatic Protection, [2006] 2 Y.B. Int’l L. Comm’n 24, U.N. Doc. A/CN.4/SER.A/2006/Add.1 (Part 2), art. 14, para. 1–2; cmt. 4 (“[I]t is clear that the foreign national must exhaust all the available judicial remedies provided for in the municipal law of the respondent State. If the municipal law in question permits an appeal in the circumstances of the case to the highest court, such an appeal must be brought in order to secure a final decision in the matter. Even if there is no appeal as of right to a higher court, but such a court has discretion to grant leave to appeal, the foreign national must still apply for leave to that court.”).

⁷ Draft Articles on Diplomatic Protection, [2006] 2 Y.B. Int’l L. Comm’n 24, U.N. Doc. A/CN.4/SER.A/2006/Add.1 (Part 2), art. 14, cmt. 6 (quoting *Elettronica Sicula S.p.A. (ELSI)*, Judgment, I.C.J. Reports 1989, p. 15, at p. 46, para. 59) (“In order to satisfactorily lay the foundation for an international claim on the ground that local remedies have been exhausted, the foreign litigant must raise the basic arguments he intends to raise in international proceedings in the municipal proceedings. In the *ELSI* case, the Chamber of the ICJ stated that ‘for an international claim to be

be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success.”⁸ And, as the Commission has stated, “[m]ere doubt as to the prospect of success in going to court is not sufficient to exempt a petitioner from exhausting domestic remedies.”⁹

In his letter dated November 7, 2017, Petitioner identifies five claims he has pursued in U.S. courts.¹⁰ Despite his pursuit of these claims, none is sufficient to satisfy the Commission’s exhaustion requirement under Article 31 of the Rules because none has been exhausted (i.e., appealed to the highest authority).

- Case No. 2:02-cv-259, in which Petitioner complained of failure to provide English language assistance while incarcerated, was dismissed on December 16, 2009, pursuant to 28 U.S.C. §1915 A(b), because the complaint failed to contain a legally viable claim. Petitioner did not appeal that decision or otherwise amend his complaint. Therefore, Petitioner failed to exhaust domestic remedies with respect to this claim.
- Case No. 2:11-cv-0015, in which Petitioner complained of certain conditions of his incarceration related to food, was dismissed in large part by the district court; a jury found against Petitioner in the claims that survived dismissal. Petitioner appealed neither the dismissal of certain claims nor the judgment against him at the district court level. Therefore, Petitioner failed to exhaust domestic remedies with respect to this this claim.
- Case No. 2:11-cv-258, filed September 28, 2011, regarding certain alleged prison conditions, was dismissed in part by the district court, which ultimately rendered a decision against Petitioner in the remaining claim on January 6, 2017. Petitioner was denied leave to proceed on appeal in *forma pauperis* and did not pay the appellate fee; accordingly, his appeal was dismissed for failure to pay the required docketing fee pursuant to Circuit Rule 3(b) on May 3, 2017. Petitioner failed to exhaust domestic remedies with respect to this this claim.

admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success’.”).

⁸ Elettronica Sical S.p.A. (ELSI) (United States v. Italy), [1989] I.C.J. 15, 46.

⁹ Sánchez et al. v. United States (“Operation Gatekeeper”), Petition No. 65/99, Inadmissibility (“Operation Gatekeeper Inadmissibility Decision”), ¶ 67.

¹⁰ Letter of Nov. 7, 2017, at 2.

- Case No. 2:14-cv-179, filed June 12, 2014, concerned alleged violations of Petitioner’s due process rights for failure to correct erroneous information in his Bureau of Prisons files, as well as claims regarding the use of tear gas and smoke in alleged violation of his Fifth and Eighth amendment rights, and alleged violations of his Sixth Amendment right to counsel and access to courts by failing to address the loss of certain legal materials. Though the claim was dismissed by the district court on October 9, 2014, Petitioner was granted the opportunity to file an amended complaint, which was dismissed December 11, 2015. Petitioner did not appeal this judgment and, therefore, failed to exhaust domestic remedies with respect to this claim.
- Case No. 2:17-cv-0050, filed on February 1, 2017, concerned alleged violations of Petitioner’s Eighth Amendment right in connection with the use of pepper spray and tear gas and the presence of smoke. The district court granted defendants’ motion for summary judgment on December 6, 2018 and denied Petitioner’s motion for reconsideration on January 16, 2019. Petitioner filed a notice of appeal on February 5, 2019 (USCA Case No. 19-1230), which appeal is still pending. Therefore, Petitioner continues to pursue domestic remedies with respect to this claim.
- Case No. 2:18-cv-00490, filed subsequent to Petitioner’s letter of November 2017 on November 2, 2018, concerns access to certain legal materials. That claim is still pending and, therefore, Petitioner continues to pursue domestic remedies with respect to this claim.

The Commission must declare the Petition inadmissible because Petitioner has not satisfied his duty to demonstrate that he has “invoked and exhausted” domestic remedies under Article 20(c) of the Commission’s Statute and Article 31 of the Rules. The Commission should not intervene at any stage of ongoing domestic court proceedings where success in those proceedings would provide the relief Petitioner seeks from the Commission. Further, the Commission cannot—consistent with the Rules and the principles of international law reflected therein—assess the merits of the Petition while ongoing domestic litigation could provide Petitioner with the redress he seeks from the Commission. To the extent that Petitioner has pursued, but failed to exhaust, domestic remedies with respect to certain claims, such failure is insufficient to satisfy Article 31 of the Rules. Therefore, the Petition is inadmissible under Article 31(1) of the Rules and must be dismissed.

II. The Commission cannot review the merits of the Petition without running afoul of the fourth instance formula

The Petition should be dismissed because the Commission lacks competence to sit as a court of fourth instance, or otherwise as an appellate chamber. The Commission has repeatedly stated that it may not “serve as an appellate court to examine alleged errors of internal law or fact that may have been committed by the domestic courts acting within their jurisdiction”—a doctrine the Commission calls the “fourth instance formula.”¹¹ The fourth instance formula recognizes the proper role of the Commission as subsidiary to States’ domestic judiciaries,¹² and indeed, nothing in the American Declaration, the OAS Charter, the Commission’s Statute, or the Rules gives the Commission the authority to act as an appellate body. The Commission has elaborated on the limitations that underpin the fourth instance formula in the following terms: “The Commission ... lacks jurisdiction to substitute its judgment for that of the national courts on matters that involve the interpretation and explanation of domestic law or the evaluation of the facts.”¹³ It is not the Commission’s place to sit in judgment as another layer of appeal, second-guessing the considered decisions of a state’s domestic courts in weighing evidence and applying domestic law, nor does the Commission have the resources or requisite expertise to perform such a task. Under the fourth instance formula, the Commission’s review of Petitioner’s claims is precluded. Petitioner raised before domestic courts the very allegations he appears to make in the Petition—these claims were carefully considered by U.S. courts and, in several instances, such consideration is ongoing. In no instance has Petitioner exhausted his claims

¹¹ *Marzioni v. Argentina*, Case No. 11.673, Report No. 39/96, Inadmissibility, Oct. 15, 1996, ¶ 51 (“*Marzioni* Inadmissibility Report”).

¹² *See* *Castro Tortrino v. Argentina*, Case No. 11.597, Report No. 7/98, Admissibility, Mar. 2, 1998, ¶ 17.

¹³ *Macedo García de Uribe v. Mexico*, Petition No. 859-03, Report No. 24/12, Inadmissibility, Mar. 20, 2012 (“*Macedo* Inadmissibility Report”), ¶ 40. The Commission has interpreted and applied the fourth instance formula in the same way for OAS Member States that are parties to the legally binding American Convention and for those, including the United States, for which review is instead undertaken pursuant to the nonbinding American Declaration, where there must be even more deference. *See, e.g., id.* at ¶ 40 (emphasis added) (“The judicial protection afforded by the [American] Convention [on Human Rights] includes the right to fair, impartial, and prompt proceedings which give rise to the possibility, *but never the guarantee*, of a favorable outcome. Thus, the interpretation of the law, the relevant proceeding, and the weighing of the evidence is, among others, a function to be exercised by the domestic jurisdiction, which cannot be replaced by the IACHR.”).

before U.S. courts, and the Commission cannot be used as a substitute for appeal in the U.S. judicial system.¹⁴

The Commission must consequently decline this invitation to sit as a court of fourth instance. Acting to the contrary would have the Commission second-guessing the legal and factual determinations of U.S. courts, conducted in conformity with due process protections under U.S. law and fully consistently with U.S. commitments under the American Declaration. The Commission has long recognized that “if [a petition] contains nothing but the allegation that the decision [by a domestic court] was wrong or unjust in itself, the petition must be dismissed under [the fourth instance formula].”¹⁵ Moreover, the mere fact that Petitioner’s claims “remain unremedied”¹⁶ does not empower the Commission to sit in judgment as another layer of appeal. The Commission has reiterated that “the fact that the outcome [of a domestic proceeding] was unfavorable ... does not constitute a violation.”¹⁷ The fourth instance formula precludes the review sought by Petitioner.

III. The Petition fails to establish facts that could support a claim of a violation of the American Declaration

Even if the Commission does not dismiss this Petition for failing to exhaust domestic legal remedies, or in consideration of the fourth instance formula, this Petition is inadmissible under Article 34. As the United States observed in 2015, Petitioner’s claims are plainly inadmissible under 34(a) of the Rules for failure to state facts that tend to establish a violation of the American Declaration: Petitioner’s August 2011 letter makes no attempt to describe how his criminal trial and his treatment in prison implicate any U.S. commitments under the Declaration, and the consular notification allegation is not cognizable under the Declaration. Although Petitioner’s letter of August 17, 2016, disagrees, Petitioner makes no attempt to cure this defect, citing instead to the Commission’s report in another matter in which it found a petition admissible. Petitioner’s letter of November 7,

¹⁴ The phrase ‘fourth instance formula’ invokes a fourth chamber sitting above the lower, appellate, and supreme courts; the underlying principle of subsidiarity would apply with equal force where the Commission is invited to operate as an appellate chamber with respect to decisions by lower courts that have not been exhausted (i.e., appealed to the third (highest) chamber of appeal).

¹⁵ *Marzioni* Inadmissibility Report, *supra* note 42, ¶ 51.

¹⁶ Petitioner’s submission of August 17, 2016, at 5.

¹⁷ *Maldonado Manzanilla v. Mexico*, Petition No. 733-04, Report No. 87/07, Inadmissibility, Oct. 17, 2007, ¶ 58 (quoting and citing *Rodríguez v. Argentina*, Case No. 10.382, Report No. 6/98, Inadmissibility, Feb. 21, 1998, ¶ 71).

2017, requests that the Commission declare the Petition admissible “for the purpose of examining the alleged violations of the rights” set forth in Articles I, XVIII, and XVI of the American Declaration, however it remains the case that the Petition fails to state facts that establish a violation of the rights under the Declaration as an initial matter. The Petition is, accordingly, inadmissible under Article 34(a) of the Rules.

IV. Conclusion

The Commission should declare the Petition to be inadmissible because Petitioner has not stated facts that tend to establish a violation of any rights in the American Declaration. Moreover, Petitioner has failed to exhaust his domestic remedies and continues to litigate various claims ostensibly related to the subject matter of the Petition in the domestic courts of the United States. Finally, the Commission should decline the invitation to operate as a court of fourth instance—or otherwise as an appellate chamber—to review Petitioner’s claims which have been carefully adjudicated by the courts of the United States. Should the Commission nevertheless declare the Petition admissible and examine its merits, the United States urges it to find the Petition without merit and deny Mr. Kadamovas’s request for relief.